

NO. 41715-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

DELWYN JAMES GIBBONS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00681-8

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

- A. The Court should decline review of the defendant's assignment of error because the special verdict instruction was not erroneous.
- B. The Court should decline review of the defendant's assignment of error because the defendant did not preserve this challenge for review.

II. STATEMENT OF THE CASE

A. Procedural History

The appellant (hereafter, "defendant") was charged by Fifth Amended Information with three counts of Assault in the Second Degree – Strangulation (Domestic Violence), two counts of Assault in the Fourth Degree (Domestic Violence), Felony Harassment (Domestic Violence), and Unlawful Imprisonment (Domestic Violence). (CP 18-21). The State alleged the aggravating factors of "vulnerable victim" and "deliberate cruelty" for each felony count. (CP 18-21). Trial commenced on December 13, 2010. (RP 144). The jury convicted the defendant of all charges except Felony Harassment. (CP 64, 68, 72, 76, 80, 81, 85). The jury found the State proved the aggravating factor of "vulnerable victim" for each felony count. (CP 66, 70, 74, 83). The jury found the State proved the aggravating factor of "deliberate cruelty" only for two of the counts of Assault in the Second Degree. (CP 65, 69, 73, 82). The trial court entered findings of fact and conclusions of law in support of an

exceptional sentence and sentenced the defendant to 120 months confinement. (CP 99, 108-111). This timely appeal followed. (CP 115).

B. Summary of Facts

Dawn Cauthron is a paraplegic. (RP 352). Cauthron is confined to a wheelchair and has no mobility from the waist-down. (RP 353-54). Cauthron has been dating the defendant since the end of 2008. (RP 355). The two have an infant child together. (RP 357). Between April 26, 2010 and April 28, 2010, the defendant strangled Cauthron on three separate occasions while inside their home in Vancouver, Washington. (RP 234-35).

The first time the defendant strangled Cauthron, he threw Cauthron on the bed in the master bedroom, handed Cauthron their baby, and then pulled a red bathrobe tie around Cauthron's neck until she passed out. (RP 696-699). The second time the defendant strangled Cauthron, he approached her from behind while she sat in her wheelchair, put his arm around her neck in a "chokchold" and lifted her out of her wheelchair. (RP 700). The third time the defendant strangled Cauthron, he approached Cauthron while she sat in her wheelchair, tied a black silk bathrobe tie around her neck and wrists, and then pressed Cauthron's hands towards her lap. (RP 701-702). While Cauthron was tied-up, the defendant put a

“newsboy” style hat on her head and then walked away. (RP 703).

During this time period, the defendant also repeatedly hit Cauthron in the face, he threw her out of her wheelchair, he moved Cauthron’s wheelchair to a location where it was inaccessible to her, and he hid Cauthron’s car keys, cell phone, and identification. (RP 230, 232, 234, 696).

C. Trial Facts

After both sides rested, the court discussed proposed jury instructions with counsel. (RP 794-801). The parties were given the opportunity to object to any proposed instructions on the record. (RP 800). On the record, the parties agreed the counts of assault would be distinguished as follows: Count One: Assault in the Second Degree “red tie,” Count Two: Assault in the Second Degree “black tie,” Count Three: Assault in the Second Degree “arm,” Count Five: Assault in the Fourth Degree “face,” and Count Seven: Assault in the Fourth Degree “wheelchair.” (RP 800-01; CP 42-44, 46, 48; Instruction No. 17, 18, 19, 21, 23).

On the record, the parties also agreed the following special verdict instruction would be given to the jury:

[y]ou will also be given special verdict forms for the crimes charged in counts 1-7 (Count One: Assault in the Second Degree, Count Two: Assault in the Second Degree, Count Three: Assault in the Second Degree, Count Four:

Harassment, Count Five: Assault in the Fourth Degree, Count Six: Unlawful Imprisonment, and Count Seven: Assault in the Fourth Degree).¹

If you find the defendant not guilty of any of the crimes charged in counts 1-7, do not use the special verdict forms. If you find the defendant guilty of any of the crimes charged in counts 1-7, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach.

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

- (RP 800-01; CP 49; Instruction No. 24).

The following colloquy took place on the record, between the court and counsel regarding the special verdict instruction:

STATE: I would just like to add we also eliminated from the special verdict instruction, we eliminated the line that would have said you all have to be unanimous to find "no", on a special verdict.

JUDGE: Correct. We talked about it and I think we looked at the WPIC's...if they are not unanimous in the guilty then - - then that's how it is...Anything further?

STATE: Nothing further Thank you.

The jury was given a special verdict form for each count (including both counts of Assault in the Fourth Degree) in which it was asked whether the defendant and Cauthron were members of the same family or household). (CP 71, 75, 79, 84, 86). The jury answered "yes" on each special verdict and the defendant does not challenge these findings.

DEFENSE: Nothing further, Your Honor.

- (RP 800-01).

Defense counsel did not object to the special verdict instruction. (RP 800-01). Defense counsel also did not object to any other proposed instructions. (RP 794-802).

III. ARGUMENT

A. The special verdict instruction was not erroneous.

The defendant claims this Court must reverse his special verdict convictions and his exceptional sentence because the special verdict instruction was erroneous in light of the Supreme Court's decision in *State v. Bashaw*. *Br. of Appellant* at 5 (citing *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010)). For the reasons set forth below, the defendant's claim is without merit.

The appellate court reviews challenges to jury instructions de novo. *Bashaw*, 169 Wn.2d at 140 (citing *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 315 (2009)). In *Bashaw*, the defendant was charged with three counts of delivery of a controlled substance. *Bashaw*, 169 Wn.2d at 137. The State also alleged sentencing aggravators based on the defendant's proximity to school bus route stops at the time of the

committed the offenses. *Bashaw*, at 137. In its special verdict instruction, the trial court instructed the jury, pursuant to WPIC 50.60, “that it had to be unanimous to return a verdict of either ‘Yes’ or ‘No’ on the special interrogatories...” *State v. Bashaw*, 144 Wn. App. 196, 198, 182 P.2d 451 (2009).

The Washington Supreme Court ultimately found it was error for the trial court to instruct the jury that it must be unanimous in order to answer “no” on the special interrogatories. *Bashaw*, 169 Wn.2d at 145-46. Reaffirming its decision in *State v. Goldberg*, the Court stated, while the jury must unanimously find the State *has* proven the presence of a special finding that increases a defendant’s maximum sentence, “a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence.” *Bashaw*, at 145-46 (citing *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

The special verdict instruction in this case is different than the special verdict instruction that was provided in *Bashaw*. Unlike in *Bashaw*, the jury here was instructed that it must be unanimous only in order to answer “yes” on the special verdict forms. The special verdict instruction stated, in pertinent part:

...[b]ecause this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict form "yes," *you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.*

(CP 49; Instruction No. 24) (emphasis added). The special verdict instruction did not include the final sentence from former WPIC 160.00, which stated, "[i]f you unanimously have a reasonable doubt as to this question, you must answer 'no'." WPIC 160.00 (2008 ed.). It is this final sentence from former WPIC 160.00 that the Supreme Court implicitly found to be fatal in *Bashaw*.

The defendant argues, when the "combined effect" of the jury instructions in his case are considered, they form the functional equivalent of an erroneous "*Bashaw*" instruction. *Br. of Appellant* at 2, 4-5. However, the only instructional language that the Court considered in *Bashaw* was the language contained within the special verdict instruction. *Bashaw*, 169 Wn.2d at 139.

Also, the Court's inquiry in *Bashaw* was limited to a consideration of special verdict instructions for sentencing enhancements. *Bashaw*, at 147. The Court did not review special verdict instructions for aggravating factors. In this case, the State alleged only aggravating factors.

This Court should decline the defendant's invitation to unnecessarily expand the Court's holding in *Bashaw*. The Court should find the special verdict instruction was not erroneous.

B. The defendant did not preserve this challenge for review.

Under Wash. CrR 6.15, a defendant must state a reasoned objection to a jury instruction at the time of trial in order to preserve an alleged instructional error for review. *State v. Bertrand*, No. 40403-6-II, 2011 Wash. App. LEXIS 2773 (Wash. Ct. App. December 08, 2011). Under Wash. RAP 2.5(a), the appellate court may refuse to review any claim of error that was not raised in the trial court and preserved for review. These rules requiring issue preservation "encourag[e] the efficient use of judicial resources" by affording the trial court the opportunity to correct an error before it reaches the jury. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

Under RAP 2.5(a)(3), an exception to the rule requiring issue preservation arises only if the appellant can demonstrate "manifest error affecting a constitutional right." RAP 2.5(a)(3). The burden shifts to the State to prove the error was harmless beyond a reasonable doubt only if the defendant can successfully show his or her claim raises manifest

constitutional error. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

1) *The defendant cannot demonstrate constitutional error.*

Even if this Court finds the special verdict instruction was erroneous or it finds the “combined effect” of the jury instructions was erroneous, the Court should find the defendant is not entitled to have the error reviewed for the first time on appeal because he cannot show the error is of a constitutional magnitude. This finding should be dictated by the Court’s recent decisions in *State v. Grimes* and *State v. Bertrand*. *State v. Grimes*, No. 40392-7-II, 2011 LEXIS 2717 (Wash. Ct. App. Dec. 2, 2011); *State v. Bertrand*, No. 40403-6-II, 2011 LEXIS 2773 (Wash. Ct. App. December 8, 2011).

The defendant in *Bashaw* did not object to the special verdict instruction. *Bashaw*, 144 Wn. App. at 198. However, neither party raised “issue preservation” on appeal. Consequently, the *Bashaw* court never addressed the question of whether the instructional error was of “constitutional magnitude” or whether it was “manifest.” In fact, the Court said its finding of error “[w]as not compelled by constitutional protections against double jeopardy, but rather by common law precedent of this court, as articulated in *Goldberg*.” *Bashaw*, at 146, *tn. 7*.

Nonetheless, the Court reviewed the error under a constitutional harmless error standard. *Id.* at 143, 147.

In *Grimes* and *Bertrand*, the jury was instructed that it must unanimously agree whether the State had proven or failed to prove the aggravating factor, in order to answer “yes” or “no” on the special verdict form. *Grimes* at 7; *Bertrand* at 5. Neither defendant objected to the special verdict instruction at the time of trial. *Grimes* at 7-8; *Bertrand* at 5. On appeal, both defendants claimed, pursuant to *Bashaw*, the instructional error was of a constitutional magnitude and it could be raised for the first time on appeal. This Court disagreed. The Court found the defendants’ constitutional rights were not automatically violated even though the special verdict instructions were erroneous, pursuant to *Bashaw*. *Grimes* at 13-14; *Bertrand* at 9 *fn.* 10. The Court found it was not constrained by the Supreme Court’s decision in *Bashaw* to find constitutional error because the *Bashaw* court never actually identified a constitutional right that was implicated by the instructional error. *See Grimes* at 11-12. The Court found the defendants failed to demonstrate what, if any, constitutional rights were implicated by the instructional errors in their cases. *Grimes* at 25-26; *Bertrand* at 14. Consequently, the Court found the defendants failed to preserve the instructional errors for

review when they did not object to the instructions at the time of trial.

Grimes at 31; *Bertrand* at 14.

The Court's findings in *Grimes* and *Bertrand* should control in this case. The defendant cannot show an error in the special verdict instruction is of a constitutional magnitude. Consequently, pursuant to RAP 2.5(a), the defendant failed to preserve this alleged error for review when he did not object to the special verdict instruction at the time of trial.

In addition, the defendant is not entitled to have this assignment of error reviewed for the first time on appeal because he cannot meet the requirements for issue preservation that were recently set forth in *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011). In *Robinson*, the Supreme Court recognized, "in a narrow class of cases," the stringency of RAP 2.5(a) would be counter-productive to the goals of "judicial efficiency" and to "promoting justice." *Robinson*, 171 Wn.2d at 304-05. Consequently, the Court set forth a four-part test under which the normal requirements of issue preservation will not apply. *Robinson*, at 305 (finding RAP 2.5(a) will not apply when (1) a court issues a new controlling constitutional interpretation material to the defendant's case; (2) that interpretation overrules an existing controlling interpretation; (3) the new interpretation applies retroactively to the defendant; and (4) the defendant's trial was completed prior to the new interpretation).

Here, the defendant cannot meet the requirements of the *Robinson* test. The Court's holding in *Bashaw* is not material to the defendant's case. The jury in the defendant's case was not instructed that it must be unanimous in order to answer "no" on the special verdicts. Also, as this Court pointed out in *Grimes*, the Court's holding in *Bashaw* did not overrule existing case law; rather, it affirmed previous case law from *Goldberg*. *Grimes* at 25.

In addition, the defendant's trial was not completed prior to the Court's interpretation in *Bashaw*. Trial in this case was held approximately six months after the Court issued its opinion in *Bashaw*.² From the record, it is reasonable to infer the parties contemplated *Bashaw* when they crafted the special verdict instruction. (RP 801). Additionally, it is reasonable to infer the defendant did not object to the special verdict instruction because he believed the parties cured the defect identified by the Court in *Bashaw* when they agreed to remove the final sentence of former WPIC 160.00 from the special verdict instruction. The concerns for judicial efficiency and the promotion of justice that motivated the Court in *Robinson* are simply not present in this case. Unlike the defendants in *State v. Ryan* and *State v. Nunez*, this defendant should not be exempted from the requirements of issue preservation. *State v. Ryan*.

² *Bashaw* was filed on July 1, 2010.

160 Wn. App. 944, 948-49, 252 P.3d 895 (2011), *review granted* 2011 Wash. LEXIS 619 (Wash., Aug. 9, 2011); *State v. Nunez*, 160 Wn. App. 150, 154, 157, 160, 248 P.3d 103 (2011), *review granted* 2011 Wash. LEXIS 616 (Wash., Aug. 9, 2011).³

Also, the “combined language” of the jury instructions in this case was not unconstitutionally “misleading.” *See Br. of Appellant* at 5. The jury was properly instructed as to the presumption of innocence and as to the reasonable doubt standard. (CP 30: Instruction No. 5). The jury was also properly instructed as to the elements of each offense. (CP 42-48: Instruction No. 17-23). The special verdict instruction and the “combined instructions” did not undermine any of these constitutional rights.

2) *The defendant cannot demonstrate manifest error.*

Assuming, *arguendo*, this Court finds either the special verdict instruction or the “combined effect” of the jury instructions was constitutionally erroneous, the Court should nonetheless decline review because the defendant cannot show the error was “manifest.”

“‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” ... To demonstrate actual prejudice, there must

³ *Ryan* and *Nunez* were recently accepted for review by the Supreme Court in order to resolve the courts’ differing interpretations of *Bashaw*. Trial in both cases was completed before the Supreme Court issued its opinion in *Bashaw*. *Ryan*, 160 Wn. App. 944 (notice of appeal filed December 18, 2009); *Nunez*, 160 Wn. App. 150 (notice of appeal filed July 13, 2009).

be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” ... In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. ... “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.”

- *State v. O'Hara*, 161 Wn.2d 91, 217 P.3d 756 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (internal citations removed)).

In both *Grimes* and *Bertrand*, this Court found the defendants could not show the error in the special verdict instruction was “manifest” because the defendants could not demonstrate “actual prejudice.” *Grimes* at 26-27; *Bertrand* at 14. The Court found the facts in *Grimes* and *Bertrand* were distinguishable from *Bashaw* and *Goldberg*. In *Bashaw*, the defendant objected to the admission of the results from the measuring devices that were used to calculate his proximity to the school but route stops because he claimed the State had not shown the devices were reliable. *Bashaw*, at 138. However, in *Grimes* and *Bertrand*, the evidence that supported the aggravating factors was uncontroverted. *Grimes* at 26-27; *Bertrand* at 4. In *Goldberg*, the jury originally answered “no” on the special verdict form. *Goldberg*, 149 Wn.2d at 890-91. When the trial court polled the jury, it learned the jury’s answer on the special verdict form was not unanimous. The trial court instructed the jury to deliberate

until it could reach a unanimous decision. *Goldberg*, at 891. However, in *Grimes* and *Bertrand*, there was no evidence from the record that the jury ever disagreed about whether the State had proven the presence of the aggravating factor beyond a reasonable doubt. *Grimes* at 27.

Similarly, in this case, the defendant cannot show he was actually prejudiced because the evidence that supported the “vulnerable victim” aggravator was uncontroverted and the evidence that supported the “deliberate cruelty” aggravator was overwhelming. The jury was provided with the following definition of Vulnerable Victim:

A victim is “particularly vulnerable” if he or she is more vulnerable to the commission of the crime than the typical victim of Assault in the Second Degree, Harassment, and/or Unlawful Imprisonment. The victim’s vulnerability must also be a substantial factor in the crime.

(CP 52; Instruction No. 27; WPIC 300.11). The court has found a victim is particularly vulnerable due to “extreme youth, advanced age, disability, or ill health.” *State v. Baird*, 83 Wn. App. 477, 488, 922 P.2d 157 (1996). Here, it was undisputed that Dawn Cauthron was a paraplegic. It was also undisputed that Cauthron was paralyzed at the time the crimes were committed. Further, it was undisputed that the defendant was aware of Cauthron’s physical handicap. Because of her handicap, Cauthron could not defend herself from the defendant, as could a typical victim of Assault or Unlawful Imprisonment. Because of her handicap, the normal avenues

of escape were not available to Cauthron. The defendant was advantaged by Cauthron's paraplegia because it facilitated his ability to commit each offense.

The jury was provided with the following definition of Deliberate Cruelty:

"Deliberate Cruelty" means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime.

(CP 51; Instruction No. 26; WPIC 300.10). As to Count One (Assault in the Second Degree, "red tie"), the jury heard uncontroverted evidence that the defendant handed Cauthron their baby immediately before he strangled her with the red robe tie. Certainly, it was not necessary to hand Cauthron her baby in order to strangle her. As to Count Two (Assault in the Second Degree, "black tie"), the jury heard uncontroverted evidence that the defendant put a "newsboy" style cap on Cauthron's head after the defendant tied Cauthron's wrists to her neck, while she sat in her wheelchair. Certainly, it was not necessary to put a hat on Cauthron's head in order to strangle her. The defendant committed these additional acts only to cause emotional pain, "as an end in itself."

Also, the defendant cannot show "actual prejudice" because there is no evidence from the record that the jury disagreed about whether the

State had proven any of the aggravating factors. The jury asked one question during its deliberations: “for instruction #22, the time period in question is ‘on or about April 28, 2010... [w]hat specially does that period cover...” (CP 63). This question related only to the relevant time frame for Count Six: Unlawful Imprisonment, it did not relate to the sentencing aggravators. The fact that the jury answered “no” on two of the special verdict forms indicates the jury understood it could answer “no” if it was not unanimous.⁴ (CP 73, 82). On the record before this Court, there is no evidence that any instructional error was “so obvious” that it warrants this Court’s review. *See O’Hara*, at 99-100.

3) *If manifest constitutional error occurred, the error was harmless.*

The State does not concede that any error occurred in this case. Also, if error occurred, the defendant cannot show the error was of a constitutional magnitude or that it was manifest. However, if this Court finds manifest constitutional error occurred, the Court should also find any error was harmless. “To find an error harmless beyond a reasonable doubt, an appellate court must find that the alleged instructional error did not contribute to the verdict obtained.” *Grimes* at 22 (citing *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002)). The court reviews the

⁴ The jury found the State had not proven “deliberate cruelty” for Count Three (Assault in the Second Degree, “arm” or for Count Six: Unlawful Imprisonment. (CP 73, 82).

entire record in order to determine whether an error is harmless beyond a reasonable doubt. *O'Hara*, at 99.

In *Grimes*, this Court found, unlike in *Bashaw*, the jury heard direct evidence that proved the presence of the aggravating factor. *Grimes* at 30. Reviewing the entire record, the Court in found, if the special verdict instruction was manifest constitutional error, the error was harmless because “the procedure by which unanimity was achieved could not have affected the jury’s special verdict or the sentence enhancement.” *Id.*⁵

Here, the jury heard direct evidence that Dawn Cauthron is a paraplegic. The jury also heard testimony from Dr. Bissell, the emergency room physician, that Cauthron was especially susceptible to greater permanent injury because of her paraplegia. (RP 606). Additionally, the jury heard direct evidence from Cauthron that the defendant put their baby on the bed next to her before he strangled her for the first time and he put a “newsboy” cap on her head after he strangled her tied her up on another occasion and left her sitting in her wheelchair. (RP 378, 391). Reviewing

⁵ Although the Court in *Grimes*, found the instructional error was not of a constitutional magnitude, the Court nevertheless addressed whether the error was “manifest” and whether the error was “harmless.” The Court stated its analysis would serve as an “alternate basis” for ruling the defendant was not entitled to review or relief depending on the Supreme Court’s decisions in *Ryan* and *Vanez*. *Grimes* at 27, *in* 19, 29.

the entire record, there is simply no evidence that “the procedure by which unanimity was achieved could not have affected the jury’s special verdict or the sentence enhancement.”

When the jury found the defendant guilty of each count of Assault in the Second Degree and Unlawful Imprisonment, they necessarily found Cauthron was a “vulnerable victim.” When the jury found the defendant guilty of strangling Cauthron with the red tie (as alleged in Count One) and guilty of strangling Cauthron with the black tie (as alleged in Count Two), they necessarily found the defendant acted with “deliberate cruelty.”

IV. RESPONSE TO DEFENDANT’S STATEMENT OF ADDITIONAL GROUNDS.

A. First Statement of Additional Grounds.

In his first Statement of Additional Grounds (“SAG”), the defendant claims insufficient evidence supported his convictions for Count Two, Three, Five, and Seven. *SAG* at 2. The defendant does not dispute that the evidence was sufficient to convict him of Count One (Assault in the Second Degree, “red tie”) and Count Six (Unlawful Imprisonment). The defendant seems to argue, because the victim attempted to recant her testimony at trial, the evidence cannot be sufficient to support his conviction. The defendant cites no authority for this argument.

When Dawn Cauthron testified at trial she did not dispute that any of the criminal conduct occurred. Rather, Cauthron conceded the conduct occurred; however, she attempted to minimize the defendant's criminal culpability as to each act. For example, in regards to Count Three (Assault in the Second Degree, "black tie"), now claimed the defendant only "wrapped" the tie "lightly around [her] neck and [her] wrists and that's about it." (RP 389). In addition, the jury heard testimony from law enforcement officers who discovered Cauthron immediately after the three-day episode occurred. (RP 228-236, 686-715). These officers testified to the injuries they observed on Cauthron and they testified to Cauthron's original detailed statements. (RP 262, 686-715). The jury also heard testimony from the emergency room physician who treated Cauthron at the hospital. (RP 585). The emergency room physician testified that Cauthron's injuries were consistent with strangulation by ligature, with being hit in the face, and with being thrown out of a wheelchair. (RP 591, 611, 614, 618, 622). The jury also viewed evidence of the red bathrobe tie, the black silk bathrobe tie, and the "newsboy" cap that were recovered from the defendant's home immediately after his arrest. (RP 647-48). When viewed in a light most favorable to the prosecution, this evidence was more than sufficient to permit any rational

trier of fact to find the essential elements of the crimes beyond a reasonable doubt.

B. Second Statement of Additional Grounds.

In his second SAG, the defendant claims his convictions for Count Five (Assault in the Fourth Degree, “face”) and Count Seven (Assault in the Fourth Degree, “wheelchair”) must be reversed because the Assault in the Fourth Degree statute is unconstitutionally vague. *SAG* at 10.

The Court resolved this issue in *State v. Jarvis*, 160 Wn. App. 111, 117, 246 P.3d 1280 (2011). Here, the jury was provided with “to convict” instructions for Count Five and Count Seven, which set forth the elements of Assault in the Fourth Degree. (CP 46, 48; Instruction No. 21, 23). Also, the jury was provided with the common law definition of assault, as set forth in WPIC 35.50. (CP 39; Instruction No. 14). Consequently, the defendant’s claim is without merit.

C. Third Statement of Additional Grounds.

In his third SAG, the defendant claims all evidence obtained in his case is inadmissible because the officers’ original entry into his home and the officers’ subsequent arrest of him were unlawful. *SAG* at 14, 17. The defendant did not object to these alleged errors at the trial court and he cannot demonstrate manifest error affecting a constitutional right.

Pursuant to *Robinson*, this Court should find the defendant has not preserved this claim of error for review. *Robinson*, 171 Wn.2d 292; RAP 2.5(a).

D. Fourth Statement of Additional Grounds.

In his fourth SAG, the defendant claims his trial counsel was ineffective because he did not call his neighbors as witnesses to rebut the State's allegation of Unlawful Imprisonment (as alleged in Count Six). There is no evidence from the record that the defendant's neighbors were witnesses to this charge. This court should not review matters outside the record. RAP 10.10(c).

Also, Deputy Gadaire testified as an eye witness to Cauthron's imprisonment in the defendant's home. (RP 229-30). It is not reasonable to believe the outcome of the case would have been different if the "neighbors" were called as witnesses.

The defendant also claims his trial counsel was ineffective because he failed to impeach the testimony of Cauthron's sister, Lecia Massey. Defense counsel did impeach Massey's testimony. (RP 488-509). Also, the State's case did not turn on Massey's testimony. Massey was called as a witness in order to explain who was responsible for calling the police. (RP 474). It is not reasonable to believe any of the jury's verdicts would

have been different if defense counsel had conducted a more probing cross-examination of her.

V. CONCLUSION

The defendant's convictions should be affirmed. The defendant's convictions for each special verdict should also be affirmed.

DATED this 10 day of January, 2011.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


ABIGAIL E. BARTLETT, WSBA #36937
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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